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SALE OF AFTER-ACQUIRED CHATTELS.—A sale contract may concern a subject-matter which is non-existent, not because it had ceased to exist at the time of the contract (in which case the sale is void), but because at that time it had not yet begun to exist; or, at least, had not as yet become the property of the seller. It is manifest that if the contemplated subject-matter never comes into existence at all, or never becomes the property of the seller, there cannot be an executed sale—no title can pass from seller to buyer—and the contract for sale would amount to no more than an agreement, for whose breach damages might be awarded. And even if the prospective subject-matter did afterwards come into existence, the title to it could not pass at the time of the contract, but the transfer must await the existence of the subject-matter. And then the question arises, does the title pass to the buyer, as soon as the subject-matter exists, immediately and by virtue of the previous contract, without any further words or acts by seller or buyer, or must something more be done, some new act intervene (*novus actus interveniens*) to consummate the sale. The answer is that, at law, if the seller has a *potential interest* in the as yet non-existent thing, the contract is regarded as a valid sale *in presenti* to take effect *in futuro* (i. e., when the subject-matter exists), without any new act. But if the contract concerns a mere *possibility* or *expectation*, without even a potential interest, the transaction is invalid as a sale *in presenti* to take effect *in futuro*, unless after the subject-matter has come into existence the seller ratifies the previous contract, or the buyer gets possession by the authority of the seller, which is the meaning of *novus actus interveniens*. See, for full discussion, monographic notes to *Moody v. Wright* (Mass.), 46 Am. Dec. 706, and *Gregg v. Sanford* (Ill.), 76 Am. Dec. 719.

The foregoing statement of the doctrine at law as to the sale of chattels not yet in existence, makes it necessary to inquire when the seller may be said to have a "potential interest" in the subject-matter of the sale. In *Low v. Pew*, 108 Mass. 347 (11 Am. Rep. 357), the court says: "It is an elementary principle of the law of sales that a man cannot grant personal property in which he has no interest or title. . . . It is equally well settled that it is sufficient if the seller has a potential interest in the thing sold. But a mere possibility or expectancy of acquiring property, not coupled with any interest, does not constitute a potential interest in it within the meaning of this rule. The seller must have a present interest in the property of which the thing sold is the product, growth, or increase. Having such interest, the right to the thing sold when it shall come into existence is a present vested right, and the sale of it is valid. Thus a man may sell the wool to grow upon his own sheep, but not upon the sheep of another; or the crops to grow upon his own land, but not upon land in which he has no interest." And it is added: "The same principle has been applied by this court to the assignment of future wages or earnings. In *Mulhall v. Quinn*, 1 Gray (Mass.) 105, (61 Am. Dec. 414), an assignment of future wages, there being no contract of service, was held invalid. In *Hartley v. Tapley*, 2 Gray (Mass.) 565, it is held that if a person is under contract of service, he may assign his future earnings growing out of such contract. The distinction between the cases is that in the former case the future earnings are a mere possibility coupled with no interest, while in the latter case the possibility of future earnings is coupled with an interest, and the right to them, though contingent and liable to be defeated, is a vested right."

In conformity with the law as thus laid down it was held in *Low v. Pew*, *supra*, that, for want of a potential interest, a sale of fish (halibut) afterwards to be caught was invalid and did not pass the property in them to the purchaser when they were caught. And in *Skipper v. Stokes*, 42 Ala. 255, (94 Am. Dec. 646), it was decided, for the same reason, that the sale of "accounts to be made by the practice of medicine" is not a valid assignment. And the same doctrine was laid down in *Huling v. Cabell*, 9 W. Va. 522 (27 Am. Rep. 562), where an agricultural society assigned for the benefit of its creditors the expected proceeds of a fair yet to take place on its own grounds. And see *Wiant v. Hays*, 38 W. Va. 681.

So far we have considered the effect *at law* of a sale of after-acquired chattels. But *in equity* a different view is taken, and the doctrine is established, by the great weight of authority, that, though the chattels have not even a potential existence at the time of the contract, the sale nevertheless takes effect as soon as the subject-matter comes into existence; and this without the necessity for any *novus actus interveniens*. The leading case in England is *Holroyd v. Marshall*, 10 H. of L. Cas. 209, where there was an agreement by which the machinery and implements thereafter to be brought into a mill should be subject to the trusts of a mortgage; and such machinery was afterwards brought into the mill, but was taken in execution by creditors of the assignor before the assignees had done anything to perfect their title. It was held by the House of Lords (reversing Lord Chancellor Campbell), that the assignment was valid in equity against the execution creditors. See *Bispham's Eq.*, sec. 165. Also *First National Bank of Alexandria v. Turnbull*, 32 Gratt. 695, where the facts in *Holroyd v. Marshall* are set forth at length, and the decision approved.

The doctrine of a court of equity as to sales or mortgages of after-acquired property is thus laid down by Lord Westbury, in *Holroyd v. Marshall*, 10 H. of L. Cas., at p. 211 :

"It is quite true that a deed which professes to convey property which is not in existence at the time is, as a conveyance, void at law, simply because there is nothing to convey. So in equity a contract which engages to transfer property which is not in existence cannot operate as an immediate alienation, merely because there is nothing to transfer. But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a court of equity would compel him to perform the contract, and that the contract would in equity transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a court of equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described, the vendor or mortgagor would hold it in trust for the purchaser or mortgagee according to the terms of the contract. For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained."

In 3 Pomeroy's Equity, sec. 1288, the above statement of the equitable doctrine is criticised by the learned author (who, however, says of Lord Westbury that he "more than any other chancellor since Lord Hardwicke has grasped the princi-

ples of equity jurisprudence"), on the ground that it confines the doctrine to cases where equity would grant specific performance of the contract, whereas "the doctrine of equitable assignment of property to be acquired in future is much broader than the jurisdiction to compel specific performance of contracts. In truth, although a sale or mortgage of property to be acquired in future does not operate as an immediate alienation at law, it operates as an equitable assignment of a present possibility, which changes into an assignment of the equitable ownership as soon as the property is acquired by the vendor or mortgagor; and because this ownership thus transferred to the assignee is equitable and not legal, the jurisdiction by which the right of the assignee is enforced, and is turned into a legal property accompanied by the possession, must be exclusively equitable; a court of law has no jurisdiction to enforce a right which is purely equitable."

In *Braxton v. Bell*, 92 Va. 229, Judge Riely quotes, with approval, this language of Pomeroy (sec. 1288): "A sale, assignment, or mortgage, if for a valuable consideration, of chattels to be acquired at a future time, operates as an equitable assignment, and vests an equitable ownership of the articles in the purchaser or mortgagee as soon as they are acquired by the vendor or mortgagor, without any further act on the part of either; and this ownership a court of equity will protect and maintain at the suit of the equitable assignee."

The doctrine that, in the absence of a potential interest, the assignee or mortgagee of after-acquired property takes an equitable title only, and not the legal title, is important. For, as is held in *Braxton v. Bell*, *supra*, in a contest between such equitable claimant and a subsequent bona fide purchaser for value holding the legal title, the latter must prevail. See *Briscoe v. Ashby*, 24 Gratt. 454, cited by the court. But, on the other hand, such equitable title will be protected against the claims of the execution creditors of the assignor or mortgagor, on the principle laid down by Judge Burks in *Borst v. Nalle*, 28 Gratt. 423 (also cited by the court), and against a purchaser with notice of such equitable claim.

In conclusion, it may be stated that the point most in doubt as to sales or mortgages of after-acquired property is as to the effect of such sale or mortgage of crops not yet planted or sown, but to be grown, during a certain year or years, on land of which the assignor, or more commonly mortgagor, is the lessee or owner. In *Mayer v. Taylor*, 69 Ala. 403 (44 Am. Rep. 522) it is said by Somerville, J.: "The subject of mortgages on unplanted crops, not *in esse* at the time of the conveyance or assignment, has been the subject of much discussion, and the adjudged cases are greatly conflicting. Some of them hold that such a conveyance is void, and conveys no title to the crops, either legal or equitable. *Hutchinson v. Ford*, 9 Bush, 318 (15 Am. Rep. 711); *Comstock v. Scales*, 7 Wisc. 159. Others hold that they are valid at law, and good to convey a legal title. *Argues v. Wasson*, 51 Calif. 620 (21 Am. Rep. 718); *Robinson v. Ezell*, 72 N. C. 231; Jones on Chat. Mortg., sec. 143. Neither of these extreme views, however, has been adopted by this court. Its doctrine in reference to this subject is now firmly settled, that a mortgage executed by the owner or lessee of land on a crop which is not planted, but is to be planted *in futuro*, conveys to the mortgagee a mere equitable interest or title, which will not support an action of detinue, trover, or trespass. *Grant v. Seiner*, 65 Ala. 499; *Rees v. Coats*, Id. 256; *Booker v. Jones*, 55 Id. 266; *Abraham v. Carter*, 53 Id. 8. This view is, in our opinion, supported by the weight of authority. *Moore v. Bynum*, 10 S. C. 452 (30 Am. Rep. 58), and note, p. 63; *Fon-*

ville v. Casey, 1 Murph. 389 (4 Am. Dec. 559, and note, p. 560); *Sellers v. Lester*, 48 Miss. 513; and other cases cited in *Grant v. Steiner*, *supra*."

In regard to the above stated conflict of decision, the question turns on the consideration whether the owner or lessee of land can be said to have a *potential interest* in crops to be produced on such land, which are not its natural growth, and are as yet not sown or planted. If there be such potential interest, then when the crops are sown or planted a legal title therein passes to the assignee or mortgagee, and this without *novus actus interveniens*. On the other hand, if there is a mere expectancy or possibility, and no potential interest, in such crops, then no *legal* title can pass without *novus actus interveniens*; but by the doctrine of *Holroyd v. Marshall* an *equitable* title is created in the assignee or mortgagee when the crops come into existence. A few courts, however, reject the doctrine of *Holroyd v. Marshall* (see 46 Am. Dec. 718; 76 Am. Dec. 731); and such courts hold that in the absence of a potential interest, the assignee takes neither legal nor equitable title. And see *Huling v. Cabell*, 9 W. Va. 522.

The *status* of crops not yet planted is alluded to but not decided, by Burks, J., in *Brockenbrough v. Brockenbrough*, 31 Gratt. 580; and by Green, J., in *Huling v. Cabell*, *supra*. See on the subject *Butt v. Ellett*, 19 Wall. 544; *Briggs v. Hall*, 143 U. S. 346; *Apperson v. Moore*, 30 Ark. 56 (21 Am. Rep. 170); *Long v. Hines*, 40 Kansas, 220 (10 Am. St. Rep. 192); *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570 (40 Am. St. Rep. 635); 3 Am. & Eng. Enc. of Law, p. 185, "Chattel Mortgages"; 4 Id. 903, "Crops."